Supreme Court, U.S.
FILED

(1)

No. 95-1876 FEB 27 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Allen M. Lenchek
Counsel of Record
Law office of Allen M. Lenchek
401 East Jefferson Street
Suite 208
Rockville, Maryland 20850-2616
(301) 217- 5838

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

102 pp

I. STATEMENT OF QUESTIONS PRESENTED

1. Does the term "employees" in Section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of his employees or applicants for employment because they have availed themselves of Title VII's protections, include former employees?

II. PARTIES

The party to this petition is Charles T. Robinson, Sr.

The parties in the courts below were Charles T. Robinson, Sr. and Shell Oil Company.

III. TABLE OF CONTENTS

I. STATEMENT OF QUESTIONS PRESENTED . i

II. PARTIES. ii

III. TABLE OF AUTHORITIES v

IV. PRIOR OPINIONS. 1

V. JURISDICTION 1

VI. STATUTES INVOLVED 1

VII. STATEMENT OF THE CASE 2

Procedural History 2

Factual Summary 4

VIII. ARGUMENT 5

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Statute 5

The Term "Employee" As Used In Section 704(a) Is Ambiguous, Requiring The Courts To Construe It To Effectuate The Purposes Of The Act 7

A Literal Interpretation Of "Employee" Defeats The Plain Purpose Of The Act 11

The Holding Below Leads To Grossly Absurd Results 12

The Construction Given Other Employment Related Anti-Retaliation Statutes Supports Coverage Of Former Employees Under Section 704(a) 18

The Holding Below Undercuts Enforcement Of Title VII . . . 21

IX. CONCLUSION 24

III. TABLE OF AUTHORITIES

Cases — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974) 22

American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982) 7

Anderson v. Federal Deposit Ins. Corp., 918 F.2d 1139, rehearing denied (4th Cir. 1990) 10

Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) 5, 10

Bob Jones University v. United States, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983) 9, 12

Charlton v. Parmus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir. 1994), cert. denied, _____ U.S. _____, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994) 5

Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1989) 9

Dunlop v. Carriage Carpet Co.,
548 F.2d 139, 142
(6th Cir. 1977). 6, 19,21

E.E.O.C. v. Metzger,
824 F.Supp. 1 (D.D.C. 1993) 15

EEOC v. Board of Governors,
957 F.2d 424 (7th Cir.)
cert. denied, ____ U.S. ____,
113 S.Ct. 299 (1992) 21

EEOC v. Cosmair, Inc., L'Oreal
Hair Care Div., 821 F.2d 1085, 1088
(5th Cir. 1987) 6, 11

EEOC v. J. M. Huber Co., 927 F.2d
1322, 1331 (5th Cir. 1991) 6

Federal Deposit Ins. Corp. v. Tremaine,
133 F.2d 827, 830 (2d Cir. 1943) . . . 10

Food Town Stores, Inc. v. E.E.O.C.,
708 F.2d 920(4th Cir. 1983) 10

Gonzalez v. Young, 441 U.S. 600,
99 S.Ct. 1905,
60 L.Ed.2d 508 (1979) 9

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 654, 102 S.Ct. 3245,
73 L.Ed.2d 293 (1982) 13

Hackett v. McGuire Bros., 445 F.2d 442
(3d Cir. 1971) 17

Labor Board v. Hearst Publications,
322 U.S. 111, 124,
64 S.Ct. 851, 857,
88 L.Ed. 1170 (1944) 21

Mitchell v. Lublin, McGaughy & Asso.,
358 U.S. 207, 211,
79 S.Ct. 260, 3 L.Ed.2d 243 (1959) . . 15

O'Brien v. Sky Chefs, Inc.,
670 F.2d 864, 869 (9th Cir. 1982),
overruled on other grounds by Antonio v.
Wards Cove Packing Co.,
810 F.2d 1477, 1481-82
(9th Cir. 1987)(en banc) 6

Pantchenko v. C.B. Dolge Co., Inc.,
581 F.2d 1052
(2d Cir. 1978) 6, 8, 11, 14

Passer v. American Chemical Soc'y,
935 F.2d 322, 331
(D.C.Cir. 1991) 6, 18, 19

Peter Pan Fabrics, Inc. v.
Martin Weiner Corp., 274 F.2d 487, 489
(2d Cir. 1960). 8

Polsby v. Chase, 970 F.2d 1360
(4th Cir. 1992)
vacated _____ U.S. _____,
113 S.Ct. 1940 (April 26, 1993) . .13, 15

Reed v. Shepard, 939 F.2d 484
(7th Cir. 1991) 7

Ross v. Communications Satellite Corp.,
759 F.2d 355(4th Cir. 1985) 21

Rutherford v.
American Bank of Commerce,
565 F.2d 1162
(10th Cir. 1977). 6, 23, 24

Shehandeh v. Chesapeake & Potomac
Tel. Co., 595 F.2d 711
(D.C. Cir. 1978) 14, 23, 24

Sherman v. Burke Contracting, Inc.,
891 F.2d 1527 (11th Cir. 1990)
cert. denied, 498 U.S. 943,
111 S.Ct. 353, 112 L.Ed.2d 317
(1990) 6, 14

Sibley Memorial Hosp. v. Wilson,
488 F.2d 1338 (D.C.Cir. 1973) 17

U. S. Army Engineer Center v. Federal
Labor Relations Authority,
762 F.2d 409, 416 (4th Cir. 1985) . . .17

United States v. Morison, 844 F.2d 1057
(4th Cir.), cert. denied
488 U.S. 908, 109 S.Ct. 259,
102 L.Ed.2d 247 (1988) 11

United Steelworkers of America,
AFL-CIO-CLC v. Weber, 443 U.S. 193, 201,
99 S.Ct. 2721, 2726, 61 L.Ed.2d 480
(1979) 8

Wetzel v. Liberty Mut. Ins. Co.,
508 F.2d 239 (3d Cir.),
421 U.S. 1011,
95 S.Ct.2415, 44 L.Ed.2d 679 (1975) . .16

Statutes

29 U.S.C. § 201 et seq. 19

29 U.S.C. § 215 20

29 U.S.C. § 215(a)(3) 20

29 U.S.C. § 623(d) 18

42 U.S.C. § 2000e(f) 5

42 U.S.C. § 2000e et seq. . . . . .passim

42 U.S.C. § 2000e-3(a) . . . . . passim

42 U.S.C. § 2000e-3(a)(1982) 5

IV. PRIOR OPINIONS

The opinion sought to be reviewed is published at Robinson v. Shell Oil Company, 70 F.3d 325 (4th Cir. 1995)(in banc). (App. pp. A1-A29). The prior panel opinion, Robinson v. Shell Oil Company, No. 93-1562 (4th Cir. January 18, 1995), vacated on rehearing in banc, was designated for publication but is unreported. (App. pp. A30-A61). The District Court opinion, Robinson v. Shell Oil Company, No. JFM-93-28 (D.Md. April 8, 1993) is unpublished. (App. pp. A62-A63).

V. JURISDICTION

Petitioner seeks this Court's review of the judgment entered on November 29, 1995 by the United States Circuit Court of Appeals for the Fourth Circuit on rehearing in banc, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1). This Petition is timely filed because it was mailed within ninety days of November 29, 1995, the date of entry of judgment in the court below. Rules 13.4 and 29.2.

VI. STATUTE INVOLVED

42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,. . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

VII. STATEMENT OF THE CASE

Procedural History

On January 4, 1993, petitioner Charles T.Robinson, Sr. ("Robinson") filed a pro se complaint in the District Court entitled "Complaint for Retaliation." The District Court had jurisdiction under 42 U.S.C. § 2000e-5(f)(3). The complaint asserted that Robinson was an employee of respondent Shell Oil Company ("Shell"); that on October 7, 1991, Robinson filed a charge with the Equal Employment Opportunity Commission (EEOC) charging Shell with racial discrimination; and that thereafter, "without grounds or justification, [Shell] has been providing false information and negative job references to perspective (sic) employers." The complaint also alleged that Robinson filed a second charge with the EEOC on March 10, 1992, charging

retaliation in violation of Section 704(a) of Title VII and that the EEOC had issued a Notice of Right to Sue on the second charge.

Shell moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Robinson's retaliation complaint was not covered by Title VII because his employment with Shell was terminated prior to the negative reference and Section 704(a) assertedly does not cover former employees. The lower court found as a fact that Robinson was not employed by Shell at the time of the negative job references and, citing Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992)[1] for the proposition that Section 704(a) does not cover former employees, granted the motion to dismiss. Robinson v. Shell Oil Company, No. JFM-93-28 (D.Md. April 8, 1993) (unpublished). (App. pp. A61-A63). Robinson noted a timely appeal to the Fourth Circuit.

A panel of the Fourth Circuit held that Section 704(a) covers former employees and ordered a reversal of the district court judgment. Robinson v. Shell Oil Company, No. 93-1562 (4th Cir. January 18, 1995)(designated for

---

[1] Subsequently vacated and remanded "for further consideration in light of the position asserted by the Acting Solicitor General in his brief filed March 5, 1993." _____ U.S. _____, 113 S.Ct. 1940 (April 26, 1993).

publication but unreported). (App. pp. A30-A61).

On petition for rehearing with suggestion for rehearing in banc, the Fourth Circuit, sitting in banc (and divided 7 to 4), reversed the panel's decision and affirmed the District Court's judgment. Robinson v. Shell Oil Company, 70 F.3d 325 (4th Cir. 1995)(in banc). (App. pp. A64-A65)

Factual Summary

Charles T. Robinson, Sr. ("Robinson") was employed by Shell Oil Company ("Shell") for nearly 12 years. He was terminated in 1991. Shortly thereafter, he filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell terminated him because of his race. While that charge was pending, Robinson applied for a job with another company. That company contacted Shell for an employment reference. Shell gave the second company a negative reference. Robinson then filed a second charge with the EEOC, alleging that Shell gave the second company the negative reference in retaliation for his first charge to the EEOC. He subsequently filed an action under Title VII of the Civil Rights Act of 1964, ("the Act"), 42 U.S.C. § 2000e et seq., invoking the anti-retaliation provision in Section 704(a), 42 U.S.C. § 2000e-3(a). (App. pp. A31-A32).

ARGUMENT

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Statute

Title VII of the Civil Rights Act 1964 ("the Act"), 42 U.S.C. § 2000e et seq., includes an anti-retaliation provision in Section 704(a). Section 704(a) provides

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a)(1982).

"Employee" is defined in the Act as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Nevertheless, this section has been construed by seven Circuits to cover former employees. Charlton v. Parmus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir. 1994), cert. denied, _____ U.S. _____, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988);

Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir.), cert. denied, 498 U.S. 943, 111 S.Ct. 353, 112 L.Ed.2d 317 (1990); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977); Passer v. American Chemical Soc'y, 935 F.2d 322, 331 (D.C.Cir. 1991)(holding "employees" under Age Discrimination in Employment Act's (ADEA) parallel provision includes former employees so long as the alleged discrimination is related to or arises out of the employment relationship); EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088 (5th Cir. 1987)(holding "employees" under ADEA's parallel provision includes former employees so long as the alleged discrimination is related to or arises out of the employment relationship); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), overruled on other grounds by Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987)(en banc); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977)(holding "employee" under Fair Labor Standards Act's anti-retaliation provision includes former employees). Cf. EEOC v. J. M. Huber Co., 927 F.2d 1322, 1331 (5th Cir. 1991).

The Seventh Circuit is the only circuit other than the Fourth Circuit that has refused to extend the protection of Section 704(a) to former employees.

Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991).[2] It is in the public interest for this Honorable Court to resolve the split among the Circuits.

The Term "Employee" As Used In Section 704(a) Is Ambiguous, Requiring The Courts To Construe It To Effectuate The Purposes Of The Act

The task of construing a statute begins with the language of the statute itself. American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). However, it is not always the case that this task ends with the literal language of the statute.

> As Learned Hand wisely observed, "It is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning."

---

[2] It is not clear that Reed holds that former employees are never entitled to Section 704(a)'s protection. The Court stated that "it is an employee's discharge or other employment impairment that evidences actionable retaliation, and not events subsequent to and unrelated to his employment." Reed, 939 F.2d at 492-93 (emphasis added). Thus, Reed apparently would extend § 704(a)'s protection to a former employee where the alleged retaliation was an "employment impairment" that was "related" to his employment.

Pantchenko v. C.B. Dolge Co., Inc., supra, 581 F.2d at 1055 (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). The letter of the law does not always control.

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.

United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979). A court charged with interpreting a statute is required to look beyond the plain language when that language is ambiguous, or when reliance on the literal language of the statute would defeat the purpose of the statute. Even though the language of the statute is unambiguous, a court still must interpret the words of a Federal statute in the light of the purposes that Congress sought to serve.

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:

> "The general words used in the clause ..., taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal -- because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, a court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...."

Bob Jones University v. United States, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983)(emphasis in the original).

Thus, in determining the meaning of a statute, the court looks not only to the particular statutory language but also to the design of the statute as a whole and to its object and policy. Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1989); Gonzalez v. Young, 441 U.S. 600, 99 S.Ct.

1905, 60 L.Ed.2d 508 (1979). In the words of Judge Learned Hand,

> There is no surer guide in the interpretation of a statue than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words do not formally quite match it.

Federal Deposit Ins. Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943). The plain meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute. Bailey v. USX Corp., supra, 850 F.2d at 1509.

When construing a part of a statute, courts must look to the surrounding statutory context for interpretation. Courts do not construe statutory phrases in isolation; they read statutes as a whole, ascertain the legislative intent, and give effect to that intent. Food Town Stores, Inc. v. E.E.O.C., 708 F.2d 920 (4th Cir. 1983). A court should, if possible, construe statutes harmoniously; this is especially true if the statutes deal with the same subject matter, even if an apparent conflict exists. Anderson v. Federal Deposit Ins. Corp., 918 F.2d 1139, rehearing denied (4th Cir. 1990). When a statute is part of a larger act,

the starting point for ascertaining the legislative intent is to look to other sections of the act that are in pari materia with the statute under review. United States v. Morison, 844 F.2d 1057 (4th Cir.), cert. denied 488 U.S. 908, 109 S.Ct. 259, 102 L.Ed.2d 247 (1988).

A Literal Constriction Of "Employee" Defeats The Plain Purpose Of The Statute

These principles of statutory construction apply in this case. The language of the Section is ambiguous. It speaks of "employees." The word can well be used to mean former employees. "[U]se of the term "employee" in referring to a former employee, while colloquial, is not inappropriate." Pantchenko v. C.B. Dolge Co., Inc., supra, 581 F.2d at 1055. "The term 'employee' includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship." E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085, 1089 (5th Cir. 1987). Because the language of the statute is ambiguous, the court must look to the purpose of the statute for its interpretation.

The purpose of Section 704(a) is to give assurance to persons contemplating making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under the Act, that they will not suffer retaliation from the employer. The Section is

intended to promote the resolution of employment discrimination disputes through the mechanisms established by Title VII. These mechanisms cannot operate fully if aggrieved persons and potential witnesses are inhibited from making charges, cooperating with EEOC investigators, testifying in hearings or otherwise participating in proceedings under the Act. Title VII would be an empty shell if aggrieved persons could only resort to its remedies on pain of retaliation from the employer.

The Holding Below Leads To Grossly Absurd Results

Even if "employee" be viewed as unambiguous, the Section must in any event be interpreted so as to give effect to its purpose. Bob Jones University v. United States, supra. If Section 704(a) is construed to not cover former employees, it can produce absurd results. Consider a hypothetical. An employee of a company files a charge with the EEOC charging the company with discriminatory denial of promotions. The employee subsequently tells the company: "I've had enough. I'm quitting. Friday is my last day. I've contacted the XYZ Company and they're interested in hiring me. Please send them a recommendation." The employee's boss sends the XYZ Company an unfavorable recommendation. But assume that Section 704(a) does not cover former

employees. If the boss sends the recommendation out on Thursday, the employee is protected by Section 704(a) but if the boss waits until the following Monday to send out the recommendation, the employee would not be protected by Section 704(a)!

Statutes should be construed to avoid absurd results. Griffin v. Oceanic Contractors, Inc., 458 U.S. 654, 102 S.Ct. 3245, 73 L.Ed.2d 293 (1982). Whether our hypothetical employee is protected by Section 704(a) should not depend on whether his employer makes the unfavorable recommendation on Thursday or Monday.

Nor should the result depend on whether the employee makes the request for a recommendation before or after he quits. The recommendation is directly related to the employee's employment. It arises out of that employment relationship.

Consider another hypothetical. An employee files a charge with the EEOC. Subsequently, his job is abolished. In the past, the employer has paid severance pay to some employees when their employment was terminated. He does not pay severance pay to this employee. The employee charges the employer with failing to pay him severance pay in retaliation for his filing a charge with the EEOC. Should coverage under Section 704(a) depend on whether the failure to

pay severance pay occurred before or after the termination of employment?

These "hypotheticals" in fact illustrate real-life issues that commonly arise under Section 704(a). Charges of retaliation brought by former employees commonly involve actions taken by employers after the employment relationship has ended but which are related to and arise out of the prior employment relationship. In Sherman v. Burke Contracting, Inc., supra, the plaintiff alleged that his former employer persuaded his subsequent employer to fire him in retaliation for a complaint that the plaintiff made to the EEOC alleging that he was fired on account of his race. In Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711(D.C. Cir. 1978) the plaintiff alleged that her former employer discouraged prospective employers from hiring her by giving them adverse references. She alleged that the adverse references were given in retaliation for an earlier charge of discrimination she made against the former employer. In Pantchenko, supra, the plaintiff alleged that after she left her employment her former employer refused to give her a letter of recommendation and made disparaging and untrue statements about her to prospective employers in retaliation for her filing a charge of discrimination with the EEOC. The Second Circuit held that proof of a refusal to provide an

"employee" with a reference in retaliation for the filing of charges with the EEOC would amount to discrimination of the type prohibited by Section 2000e-3 of the Act. 581 F.2d at 1055. There is no good reason why the same refusal should not be a violation of the Act if the employee requests the reference after the employment relationship ends.

Title VII is remedial legislation, intended to afford minorities and women the opportunity to be hired on basis of merit and to eliminate discrimination in employment based on race, color, religion, sex, or national origin. Polsby, 970 F.2d at 1365 - 66. A statute which is remedial in nature should be liberally construed. See Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 207, 211, 79 S.Ct. 260, 3 L.Ed.2d 243 (1959). In E.E.O.C. v. Metzger, 824 F.Supp. 1 (D.D.C. 1993), the EEOC sued an individual's former employer alleging that the defendant improperly informed the individual's subsequent employer of a discrimination complaint she filed against the defendant with the EEOC. The EEOC contended that the notification caused the subsequent employer to discharge the individual and was an illegal act of retaliation under Title VII. Reasoning that "strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Tile

VII", the court held that the complaint stated a cause of action under Title VII. 824 F.Supp. at 2. To construe Section 704(a) to exclude former employees gives the statute a narrow construction totally at odds with the remedial purposes of the Act.

Section 704(a) does not stand in isolation. Section 704(a) must be read in context with the entire Civil Rights Act of 1964 as amended by the Civil rights Act of 1991. The Act protects past, present and future employees. Section 703(a)(1) of the Act protects "any individual" from discrimination with respect to his "privileges of employment."[3] Because it is not limited to present employees or applicants, Section 703(a)(1) covers former employees. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44

---

[3] Section 703(a)(1) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)(emphasis supplied).

L.Ed.2d 679 (1975); Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971). The Act provides remedies for persons other than direct employees. "[T]he proscriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship." Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, at 1341, n. 47, (D.C.Cir. 1973).

The decision below ignores the Fourth Circuit's recognition that a court's task in interpreting particular sections of statutes is

> to give them the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.

U. S. Army Engineer Center v. Federal Labor Relations Authority, 762 F.2d 409, 416 (4th Cir. 1985). To construe Section 703(a)(1) to cover past employees while construing Section 704(a) to exclude them fails to give the Act the "most harmonious, comprehensive meaning" called for.

The Construction Given Other Employment Related Anti-Discrimination Statutes Supports Coverage of_Former Employees Under Section 704(a)

Passer v. American Chemical Soc., supra, was an action under a provision of the Age Discrimination in Employment Act making it

> unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d)(1988). This provision is parallel to Section 704(a). The language is identical to that of Section 704(a). By its literal language, § 623(d) protects only "employees or applicants for employment." Dr. Passer sued the American Chemical Society because, after he left the Society's employ, the Society canceled a major public symposium honoring him because he filed discrimination charges against the Society. The court held that former

employees were covered by § 623(d) "as long as the alleged discrimination is related to or arises out of the employment relationship." Passer, 935 F.2d at 330.

> To read the statute otherwise would be to deny protection to any person who has suffered discharge or termination due to unlawful discrimination. Obviously, Congress could not have intended such an absurd result.

Passer, 935 F.2d at 331.

The coverage of an anti-retaliation provision under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. was at issue in Dunlop v. Carriage Carpet Co., supra. Section 15 of the FLSA reads in part:

> [I]t shall be unlawful for any person --
>
> * * * * *
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or

> is about to testify in any such proceeding . . . .

29 U.S.C. § 215 (emphasis supplied). In Dunlop, an employee of the Carriage Carpet Company filed a complaint with the Department of Labor charging the company with failure to pay overtime rates as required by the FLSA. The employee later quit the company. Still later he applied for employment with another company. Upon inquiry, the Carriage Company informed the second employer that the employee had previously filed a complaint with the Labor Department and the second company turned down Carriage's former employee's application for employment. The Department of Labor brought suit against the Carriage Company for violating 29 U.S.C. § 215(a)(3) by discriminating against its former employee by disclosing to the prospective employer that he had filed a complaint against it under the FLSA. The Sixth Circuit held that a former employee was protected against discrimination by his former employer under 29 U.S.C. § 215, even though the statute did not refer to "former employees."

The Dunlop court reasoned that it must "look to the legislative purpose of the [act] and follow that purpose even though a literal reading of the language used would suggest a different conclusion; ... practical considerations, and not technical conceptions, guide us

in determining coverage under the [act]." 548 F.2d at 144.

The Holding Below Undercuts Enforcement of Title VII

The anti-retaliation provision is vital to the Act. The enforcement of Title VII depends upon employee cooperation. See EEOC v. Board of Governors, 957 F.2d 424, 431 (7th Cir.)("the work of the EEOC . . . depends upon employee cooperation), cert. denied, ____ U.S. ____, 113 S.Ct. 299 (1992). To assure effective enforcement of Title VII, Congress prohibited retaliation so that "employees will not fear to assert their substantive rights." Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985).

This Court noted that in Labor Board v. Hearst Publications, 322 U.S. 111, 124, 64 S.Ct. 851, 857, 88 L.Ed. 1170 (1944), the Supreme Court explained that the word "employee" in social legislation such as the National Labor Relations Act and the Fair Labor Standards Act

> . . . derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

Dunlop, 548 F.2d at 144 - 45.

The "mischief to be corrected and the end to be attained" under Section 704(a) are a sure guide to the interpretation of that Section. Just as was pointed out by the Dunlop court in the context of the Fair Labor Standards Act, Congress did not seek to secure compliance with Title VII through continuing detailed federal supervision or inspection of the employment practices of employers. Rather it chose to rely on complaints to the EEOC from employees seeking to vindicate rights claimed to have been denied. The EEOC attempts to achieve compliance with the Act through the "preferred" methods of "cooperation and voluntary compliance." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974). Plainly, effective enforcement of Title VII can only be expected if employees feel free to file charges of discrimination and participate in proceedings under the Act. The anti-retaliation provisions of Section 704(a) are designed to serve this end. Section 704(a) is intended to foster a climate in which compliance with the substantive provisions of Title VII would be enhanced. Section 704(a) fosters that climate by discouraging employers from retaliating against employees who file charges of discrimination against them. Applying Section 704(a) to cover former employees further fosters that climate.

By its terms, Section 704(a) protects applicants for employment and current employees from retaliation for taking such actions. Former employees who contemplate filing a charge of discrimination or who contemplate testifying, assisting, or participating in proceedings under the Act need assurance no less than applicants and current employees that they will not suffer retaliation for doing such things. The termination of the employment relation with the former employer does not strip that employer of the power to retaliate against such a former employee. It is a reality of life in the workplace that former employees can be hurt by their former employer. A former employer is solidly in position to impede a prior employee's reentry into the job market.

> [I]t is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job.

Shehadeh v. Chesapeake & Potomac Tel. Co., supra, 595 F.2d at 722. The former employer can give prospective employers unfavorable recommendations. Id. He can brand the former employee as an "informer." Rutherford v. American Bank of Commerce, supra, 565 F.2d at 1166.

When false reports of a former employee's suitability for employment are distributed for discriminatory reasons, disparate treatment of the affected employee vis-a-vis other former employees not so maligned is apparent. Shehadeh, supra, note 43, 595 F.2d at 720. Merely telling the prospective employer that the former employee has filed a charge against the prior employer can impede the former employee's ability to be hired by the prospective employer. See Rutherford, supra. Section 704(a) is intended to protect against such retaliation. Rutherford, Shedadeh, Pantchenko. Former employees are as much in need of protection against retaliation as current employees. The construction given to Section 704(a) by the Court below undercuts the enforcement of Title VII. To avoid undercutting that enforcement, Section 704(a) must be construed to cover former employees.

CONCLUSION

Title VII is of great public importance but the Circuit Courts of Appeal are split in their holdings on the question of whether the anti-retaliation provision of the Act protects former employees. The holding below is in the minority. It is in the public interest for this Honorable Court to resolve that split so as to provide uniformity of construction of this important statute.

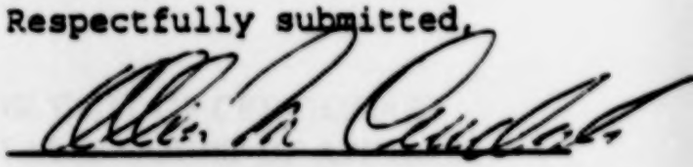
The term "employee" as used in Section 704(a) is ambiguous, requiring the courts to construe the term to effectuate the purposes of Title VII. Construing the term to include former employees carries out the manifest Congressional purpose in enacting Title VII. A literal construction defeats the purpose of the Act.

A literal construction leads to grossly absurd results.

The holding below undercuts enforcement of Title VII.

This Honorable Court should grant certiorari and reverse the holding below.

Respectfully submitted,



ALLEN M. LENCHEK
Counsel of Record
401 East Jefferson Street
Suite 208
Rockville, MD 20850-2616
(301) 217-5838
FAX (301) 251-8888

Counsel for Petitioner

No. _____

In The

Supreme Court of the United States

October Term 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Allen M. Lenchek
Counsel of Record
Law office of Allen M. Lenchek
401 East Jefferson Street
Suite 208
Rockville, Maryland 20850-2616
(301) 217- 5838

Counsel for Petitioner

TABLE OF CONTENTS
APPENDIX TO PETITION

Appendix Page

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered 11/29/95 . . . . . A-1

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered 1/18/95 . . . . . A-30

Memorandum,
United States District Court
for the District of Maryland,
entered 4/8/93 . . . . . A-62

Order,
United States Court of Appeals
for the Fourth Circuit,
Granting Petition for Rehearing
and Suggestion for Rehearing
In Banc,
entered 3/1/95 . . . . . A-64

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES T. ROBINSON, SR.,
Plaintiff-Appellant,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

No. 93-1562

Appealfrom the United States
District Court
for the District of Maryland,
at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-93-28-JFM)

Argued: September 26, 1995

Decided: November 29, 1995

Entered: November 29, 1995

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judges Russell, Widener, Wilkins,

Niemeyer, Luttig, and Williams joined. Judge Hall wrote a dissenting opinion, in which Chief Judge Ervin and Judge Michael joined. Judge Murnaghan also wrote a dissenting opinion, in which Chief Judge Ervin joined. Judge Wilkinson and Judge Motz did not participate in this case.

COUNSEL

ARGUED: Allen Martin Lenchek, Washington, D.C., for Appellant. John Foster Suhre, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Lawrence Christopher Butler, Houston, Texas, for Appellee. **ON BRIEF:** James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

OPINION

HAMILTON, Circuit Judge:

Section 704(a) of Title VII of the Civil Rights Act of 1964 (commonly referred to as Title VII's anti-retaliation provision) makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have either availed themselves of Title VII's protections or assisted others in so doing. *See* 42

U.S.C.A. §2000e-3(a) (West 1994). Subsection 2000e(f) of Title VII defines "employee" as "an individual employed by an employer." *See* 42 U.S.C.A. §2000e(f) (West 1994). The issue before the *en banc* court is whether the term "employees" includes former employees. We conclude that it does not.

I.

Shell Oil Company (Shell) terminated Charles T. Robinson (Robinson) from its employment in 1991. Shortly thereafter, Robinson filed a charge with the Equal Employment opportunity Commission (EEOC), alleging that Shell had terminated him because of his race. While that charge was pending, Robinson applied for a job with another company that contacted Shell, as Robinson's former employer, for an employment reference. According to Robinson, Shell gave him a negative reference. Robinson attributed the negative reference to Shell's intention to retaliate against him for filing the EEOC charge.

Robinson subsequently filed this action. Robinson's complaint alleged that after he filed a charge of race discrimination against Shell with the EEOC, Shell provided "false information and negative job references to perspective [sic] employers." (J.A. 6). The complaint further alleged that such action violated the anti-retaliation

provision of Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C.A. § 2000e3(a) (West 1994).

Contending the anti-retaliation provision of Title VII does not provide former employees a cause of action against their former employers for post-employment retaliation, Shell moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, *see* Fed. R. Civ. P. 12(b)(6). In support of its motion, Shell cited *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), which held that the anti-retaliation provision of Title VII does not apply to former employees. Upon Shell's motion, the district court dismissed the complaint. Subsequently, the Supreme Court summarily vacated *Polsby*. *See Polsby v. Shalala*, 113 S. Ct. 1940 (1993).[1]

[1] The Supreme Court vacated this court's judgment in *Polsby* and remanded the case to this court "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." *Polsby v. Shalala*, 113 S. Ct. 1940 (1993). Because the Supreme Court vacated *Polsby* on this ground, no meaningful argument can be made that the Supreme Court in any way addressed the merits of the present issue or concluded *Polsby* to be legally incorrect. *See United States Dep't of Health & Human Servs. v. Federal Labor Relations Auth.*, 983 F.2d 578, 581-82 & n.2 (4th Cir. 1992) (adopting reasoning of vacated opinion where vacatur did not address the issue). In light of the Supreme Court's action, we write on a clean slate.

Robinson appealed to this court. A divided panel of this court reversed the judgment of the district court, *see Robinson v. Shell Oil* Co., No. 93-1562 (4th Cir. January 18, 1995) (designated for publication, but not reported), but, on Shell's suggestion, we vacated the panel decision and reheard the case *en banc*. We now affirm.

II.

Section 704(a) of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment* . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. §2000e-3(a) (West 1994) (emphasis added). In reviewing the propriety of the district court's dismissal of Robinson's complaint, our task is to apply Title VII's anti-retaliation provision to the facts before us. The dispute regarding the correct application centers on the scope of the

term "employees." Robinson asserts the term "employees" includes former, as well as current, employees. According to Robinson, this interpretation is favorable because it gives effect to the remedial purpose of Title VII to eradicate illegal discrimination in the work place. Conversely, relying on the plain language of the statute, Shell asserts that the term "employees" includes only current employees.

A.

Initially, it is helpful to lay out the all too familiar framework of statutory interpretation. Courts are charged with the duty to apply the law that Congress enacted. Accordingly, "[w]e begin, as we must, by examining the statutory language, bearing in mind that we should give effect to the legislative will as expressed in the language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In examining statutory language, generally, words are given their common usage, and '[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* We must acknowledge that the duty of this court is to adhere faithfully to the rules of statutory interpretation rather than to "exercise[]

a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute. *See Florida Dep't of Banking & Fin. v. Board of Governors of Fed. Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) (definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), *cert. denied*, 481 U.S. 1013 (1987). As a general rule "[a] definition which declares what a term means . . . excludes any meaning that is not stated." 2A George Sutherland, *Statutes and Statutory Construction* §47.07, at 152 (5th ed. 1992) (emphasis added).

Our inquiry must cease if the statutory language is unambiguous and "'the statutory scheme is coherent and consistent.'" *Murphy*, 35 F.3d at 145 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989)). In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings

need no discussion.'" Id. (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). "The language being facially clear and 'within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.'" Id. (quoting *Caminetti*, 242 U.S. at 485).

There are, however, rare and narrow exceptions when courts may stray beyond the plain language of unambiguous statutes. Id. One such circumstance arises if the literal application of statutory language would lead to an absurd result. *See Crooks*, 282 U.S. at 59-60. Only, however, "under rare and exceptional circumstances" do courts find that literal application of statutory language would lead to an absurd result. Id. at 60. In such cases, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.* (internal citations omitted).

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See Ron Pair Enters., Inc.*, 489

U.S. at 242 ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks and citation omitted). To come within the ambit of this exception, however, the contrary intent must have been clearly expressed by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983). Most importantly, in the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, P. C.*, 935 F.2d 501, 506 (2d Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

If the plain language of the statute is ambiguous, then a court may look beyond the plain language to the legislative history for guidance. *See United States v. Southern Management Corp.*, 955 F.2d 914, 920 (4th Cir. 1992)

(recognizing that courts should look to other sources of legislative intent if the statutory language does not convey a clear meaning).

Observant of this well-established analytical framework for statutory analysis, we now turn to the statute at hand.

B.

In deciding whether Title VII's Anti-retaliation provision provides a former employee a cause of action against his former employer for post-employment retaliation, we find the statutory language unambiguously answers the question "no." First, we look at the language Congress used: "It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment*...because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. §2000e-3(a) (West 1994) (emphasis added). Subsection 2000e(f) defines "employee" for purposes of all provisions of Title VII as "an individual employed by an employer." 42 U.S.C.A. §2000e(f) (West 1994). Read in *pari materia*, these sections of Title VII provide a remedy for acts of retaliation to *employees* and *applicants for employment* who have either

availed themselves of Title VII's protections or assisted others in so doing.

Although subsection 2000e(f) defines the term "employee" as "an individual employed by an employer," Robinson contends, rather remarkably, that the term "employees" as used in Title VII's anti-retaliation provision means "former employees." His contention is legally untenable. Title VII defines "employee" for purposes of all provisions of Title VII; thus, that definition controls the meaning of "employee" wherever it appears throughout the statute. *See Florida Dep't of Banking & Fin.*, 800 F.2d at 1536. Because Title VII *does not* define "employee" as an individual *no longer employed* by an employer, then, under the rules of statutory construction, that meaning is excluded as a meaning from the term "employee." *See Statues and Statutory Construction* §47.07, at 152. We are simply prohibited from reading into the clear language of the definition of "employee" that which Congress did not include. *See Murphy*, 35 F.3d at 145. If Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including "former employee" when defining the term "employee."

Neither is the language comprising Title VII's definition of the term "employee" ("an individual employed by an employer," 42 U.S.C.A. § 2000e(f) (West

1994)), ambiguous. The rules of statutory construction require us to give the words Congress used to define "employee" their common usage. *See Murphy*, 35 F.3d at 145. The term "employed" as used in subsection 2000e(f) is commonly used to mean "performing work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). Certainly, the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship." Furthermore, "employer" as used in subsection 2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term "employer" is commonly used to mean "one who no longer employs the services of others." Accordingly, we reject any notion that the language in Title VII's definition of the term "employee" is ambiguous.

Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed. *See Murphy*, 35 F.3d at 145. Therefore, this court is bound to apply literally the term "employees" in Title VII's anti-retaliation provision as defined by Congress in subsection 2000e(f) without examination of any other sources of legislative intent, unless such application falls within one of the exceptions to literal application. *Id.*

Here, neither exception applies because both require Congress to have made plain that it intended a result different than literal application would produce. Indeed, the absence of any language in Title VII's anti-retaliation provision referring to former employees is strong evidence that Congress did not intend Title VII to protect former employees. Additionally, Congress' inclusion of "applicants for employment" as persons *distinct* from "employees," coupled with its failure to include "former employees" is strong evidence of Congressional intent that the term "employees" in Title VII's anti-retaliation provision does not include former employees. With no applicable exception to prevent literal application of the words Congress chose, we hold, as we must, that the meaning of the term "employees" in Title VlI's anti-retaliation provision does not include former employees as urged by Robinson. Because "former employees" are not included in the statutory language, Title VII's anti-retaliation provision does not protect them. Given that the statute does not protect former employees, Robinson has no claim under its aegis.

C.

Although the rules of statutory construction do not require us to proceed further, several other important

considerations support our interpretation of the anti-retaliation provision. First, the types of practices that Title VII forbids strongly point toward the scope of its anti-retaliation provision not extending beyond the employment relationship. The types of practices that Title VII forbids are particularly related to *employment*, *not* post-employment relationships. For example, Title VII specifically defines "unlawful employment practice" in part as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. §2000e-2(a)(1) (West 1994). This definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated.

Second, Title VII's anti-retaliation provision does not redress post-employment retaliation because the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an "adverse employment action" that necessarily entails conduct that occurs during the employment relationship. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *see also Reed v. Shepard*, 939

F.2d 484, 492-93 (7th Cir. 1991). Adverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge. Consequently, any adverse action taken after the employment relationship has terminated cannot be actionable under Title VII. Recognizing this point, the *Reed* court stated that because "the alleged retaliatory activities took place *after* the termination of Reed's employment" those activities were "not an adverse employment action." *Reed*, 939 F.2d at 492-93.

Given the types of practices that Title VII forbids, it follows that Congress drew the line defining the scope of Title VII at its most logical place--the termination of the employment relationship. Title VII does not redress discriminatory practices, however reprehensible, which occur after the employment relationship has ended. Rather, Congress specifically enacted the anti-retaliation provision so that applicants/employees falling victim to discrimination during their applications for employment and/or employment would be able to invoke Title VII to protect their rights without fear of retaliation.

D.

We are not unmindful that our holding is embraced by only one circuit court[2] and at odds with the majority of circuit courts that have addressed this question.[3] In concluding that Title VII's anti-retaliation provision and other parallel statutes reach post-employment retaliation, the decisions in the majority have interpreted the term

---

[2] *See Reed*, 939 F.2d at 492-93.

[3] *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir. 1994), *cert. denied*, *115 S.* Ct. 590 (1994); *Passer v. American Chem. Soc'y.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding "employees" under Age Discrimination in Employment Act's (ADEA) parallel retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988); *EEOC v. Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987) (holding "employees" under ADEA's parallel retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship); O'Brien v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1481-82 (9th Cir. 1987) *(en banc); Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. *1978); Rutherford v. American Bank of Commerce, 565 F.2d* 1162, 1165 (10th Cir. 1977); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139. 142 (6th Cir. 1977) (holding "employee" under Fair Labor Standard Act's anti-retaliation provision includes former employees) Cf. *EEOC v. J.M. Huber Corp.*, *927* F.2d 1322, 1331 (5th Cir. 1991).

"employee" broadly to "'include[] a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.'" *Passer, 935* F.2d at *330* (quoting *Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d at 1088); *see Pantchenko*, 581 F.2d at 1055. Essentially, the rationale supporting this interpretation is that a literal application of the term "employees" produces a result that would defeat the underlying policies of Title VII to eradicate discrimination in the work place. *See, e.g., Charlton, 25* F.3d at 200; *Passer*, 935 F.2d at 331; *Bailey*, 850 F.2d at 1509; *Rutherford, 565* F.2d at *1165-66*. For example, *in Charlton*, the court opined that "post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued." *Charlton, 25* F.3d at *200*.

The rationale of these decisions totally disregards, without explanation, the established analytical framework for statutory construction. Instead, they rely on broad considerations of policy. Most divine what they posit as Congress' intent from the reach of Title VII. *See, e.g., Charlton, 25* F.3d at 200. None of these decisions directly address the

absence of Congressional expression on this issue. These decisions are, therefore, at odds with the well-settled rule that in the absence of expressed Congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning. *See Goldberger & Dubin, P. C.*, 935 F.2d at 506; *Stokley, 881* F.2d at 116. Indeed, these decisions fail to heed the Supreme Court's repeated mandate: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States, 449 U.S.* 424, 430 (1981)) (internal citations omitted). Furthermore, these decisions of our sister circuits disregard Title VII's definition of "employee" as the definitive source for determining the meaning of the term "employees" as used in Title VII's anti-retaliation provision. In short, we are completely unpersuaded by their analyses, which depend for their substance on broad policy arguments which are simply not supported by the plain language of Title VII.

III.

Although extending Title VII to cover former employees is tantalizing fruit, our judicial inquiry must cease when the language of a statute is plain and unambiguous. Such is the rule of law. In no uncertain terms, Congress, for whatever reason, has chosen, through the anti-retaliation provision of Title VII, to protect "employees," *i.e.*, "individual[s] employed by an employer," and "applicants for employment," but not to protect former employees. Because Robinson's complaint alleges post-employment retaliation, the district court properly dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6). Accordingly, we affirm.

AFFIRMED

HALL, Circuit Judge, dissenting:

Imagine that on Friday, the first day of the month, XYZ Corporation decides to terminate two of its line workers, Smith and Jones, and immediately gives them two weeks' written notice. Smith and Jones, each believing that she has been unlawfully discriminated against, file charges with the EEOC on Monday the fourth. Unable, however, to afford the luxury of undue optimism, both Smith and Jones explore the possibility of signing on with XYZ's competitor, LMNOP, Inc.

On Tuesday the twelfth, XYZ's personnel department receives a letter from its LMNOP counterpart, requesting employment information and references on Smith and Jones. Annoyed that the pair have filed EEOC charges against the company, XYZ's personnel director intentionally and vindictively prepares false reports for dissemination to LMNOP. The spurious reports are placed in separate envelopes and stamped for mailing on Friday the fifteenth, which also happens to be Smith and Jones's last day at XYZ. Although Smith's report is included in Friday's outgoing mail, Jones's report is inadvertently excluded, and, therefore, not sent to LMNOP until Monday the eighteenth.

The majority cannot dispute that XYZ's conduct toward Smith and Jones was equally culpable, and that the company's behavior was precisely that which Title VII's anti-retaliation provision was designed to prohibit. Nevertheless, under the approach adopted today by the majority--an approach in diametric opposition to that employed by the vast preponderance of our sister circuits and by the EEOC itself--Smith would be entitled to file a retaliation charge, and Jones would be left out in the cold. Because the majority's decision will soon create many more Joneses than Smiths, I must respectfully dissent.

I.

A.

The majority acknowledges that, even if the term "employees" as used in Section 704(a) unambiguously designates only those persons earning a paycheck from the offending employer at the moment of retaliation, this court may nevertheless expand the scope of the designation to avoid a grossly absurd or plainly unintended result.[1] As illustrated by the XYZ hypothetical, the majority's construction of Section 704(a)

---

[1] *See ante at 4-5 (citing Crooks v Harrelson, 282 U.S. 55, 59-60 (1930), and United States v. Ron Pair Enters., Inc., 489 U.S. 235, 24042 (1989)). See also NLRB v. Wheeling Electric Co., 444 F.2d 7x3, 787 (4th Cir. 1971):*

> The cardinal rule of statutory construction is that the intent of the legislative assembly is to be given effect . . and where a literal interpretation of a statutory provision would not accord with the intended purpose of the legislation, or produces an absurd result, courts must look beyond the plain words of the statute.

(citations omitted); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600. 606 (4th Cir. 1959) (eschewing a literal reading of the Federal Trade Commission Act where such an interpretation was "plainly at variance with the policy of the legislation as a whole" (*quoting Ozawa v. United States*, 260 U.S. 178 (1922)), and would produce an absurd result).

will inevitably lead to grossly absurd results; that those results are also plainly unintended can be readily understood by examining Congress's purpose in enacting Title VII.

B.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted). The statutory scheme in this case is Title VII, and Congress's purpose in enacting it is easily discerned.

Title VII is sweeping, remedial legislation; it applies to virtually all entities that affect the employment relationship, and it proscribes a vast range of ignoble behavior.[2] There is a detailed enforcement procedure--including

[2] Various provisions of Sections 703 and 704 apply to employers, employment agencies. labor organizations, and joint labor-management committees. Section 703 prohibits, with few exceptions, all forms of discrimination in all aspects of the employment relationship on the basis of an individual's race, color. religion, gender, or national origin. 42 U.S.C.A. § 2000e-2 (West 1994). Section 704, in addition to the anti-retaliation provision at issue in this case, prohibits the publication in most cases of job notices or advertisements indicating a preference based on a suspect classification.

resort to the federal courts, which are accorded broad power to grant legal and equitable relief.[3] Congress demonstrated, by giving Title VII a broad reach, that it is serious about eradicating discrimination and its invidious effects within the employment relationship. That is why the statute was enacted, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution. Unfortunately, the majority's construction of the term "employees" in Section 704(a) will actively hinder the enforcement mechanism.

This hindrance will work on two levels. There is, of course, the obvious hindrance of allowing an employer to escape sanctions for behavior that is clearly unlawful.[4] More subtle, however,

[3] Section 706(g) empowers the court to order declaratory relief, injunctive relief such as reinstatement or hiring of employees with or without back pay. or "any other equitable relief as the court deems appropriate." 42 U.S. C.A. §2000e-5(g) (West 1994). In addition, Section 102 of the Civil Rights Act of 1991 permits courts. in an appropriate case, to award compensatory and punitive damages for violations of Sections 703 and 704 of Title VII. 42 U.S.C.A. §1981a (West 1994).

[4] The dawn of the brave new world envisioned by the majority will not escape the attention of employers, who will soon enough realize that they have been given a free rein to

is the hindrance on enforcement that will almost certainly result from the remaining employees' reluctance to bring subsequent violations to the EEOC's attention; no reasonable employee will come forward if there is any chance that his or her term of employment will soon end, thus giving the employer carte blanche to retaliate. Moreover, an aggrieved person should not be forced to remain with an abusive employer solely to ensure that he or she receives the full protection of Title VII.

C.

Today's decision erodes a crucial Title VII enforcement mechanism; it thus will inevitably erode the substantive protections of Title VII itself. Because Congress's inclusion of Section 704(a) was intended to strengthen--not weaken--the statute, I would interpret the section's language in a manner consistent with that intent.

My interpretation of Section 704(a) hardly brands me a maverick; indeed, the majority's approach is the eccentric one. No fewer than six courts of appeal have concluded, as I do, that the section's protection extends to those employees no longer actively engaged in working for

---

retaliate against disfavored employees, so long as the employee is first terminated. At XYZ Corporation, there may never be another Smith.

the retaliating employer.[5] Until now, the Seventh Circuit had stood alone in reaching the opposite conclusion. *See Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991).[6] Moreover, the EEOC itself has appeared before this court, as *amicus curiae*, to urge that we adopt the dominant rule fashioned by our sister circuits.

---

[5] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir.), *cert. denied*, 115 S. CL 590 (1994); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) *(citing EEOC v. Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987)); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. 1988); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (former employee may state a claim under Section 704(a) on something akin to an agency theory where offer of reinstatement is withdrawn in retaliation for the actions of another employee--the plaintiff's husband--in protesting his wife's discharge). Still another circuit has construed the nearly identical anti-retaliation provision of the Age Discrimination in Employment Act to apply to former employees. *See Passer v. American Chem. Soc'y.*, 935 F.2d 322, 330-31 (D.C. Cir. 1991).

[6] In *Reed*. the court of appeals affirmed a directed verdict for the defendants on the plaintiff's retaliation claim, because the complained-of activities took place after the plaintiff had been terminated.

Two of those courts have explicitly concluded that the primary focus in determining whether a plaintiff states a claim under Section 704(a) should be on whether the alleged retaliation either arose from the employment relationship or was related to the employment.[7] I wholeheartedly agree. By choosing instead to focus exclusively on the time when the employee was actively working, the majority has framed its inquiry much too narrowly; such a myopic approach only frustrates Congress's attempt, through Title VII, to eradicate workplace discrimination.[8]

---

[7] *See Charlton*, 25 F.3d at 200 ("an employee may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act is in reprisal for a protected act . . . and *arises out of or is related to the employment relationship.*"); *Pantchenko*. 581 F.2d at 1055 ("the statute prohibits discrimination *related to or arising out of an employment relationship*, whether or not the person discriminated against is an employee at the time of the discriminatory conduct.") (emphases added).

[8] In the instant case, Shell's alleged retaliation against Robinson--said to involve the dissemination of false information and an undeserved poor reference--arose from the parties' employment relationship because Shell would not have been provided the opportunity to retaliate against Robinson but for that relationship. Shell's alleged retaliation was also related to the employment because it assumed the form of facts and opinions about Robinson's professional affiliation with Shell.

II.

To this point, I have accepted, for the purposes of argument, the majority's contention that the term "employees," as used in Section 704(a), is unambiguous. I have argued that the result arrived at by the majority is nevertheless grossly absurd and so clearly contrary to Congressional intent as to justify expanding the asserted ordinary meaning of the term to embrace, if necessary, an extraordinary meaning.

In actuality, my burden is not as difficult as the majority purports it to be. If it were, it is unlikely that six other courts of appeal, comprised of judges who are doubtlessly familiar with the canons of statutory construction, would have all arrived at a conclusion that the majority of this court apparently finds so bewildering.

I believe it likely that our sister circuits have, at least implicitly, grounded their decisions on a premise that I find inescapable--that the term "employees" is ambiguous. Indeed, under the statute's tautological definition of the term as "individual[s] employed by an employer," *see* 42 U.S.C.A. §2000e(f) (West 1994), one could no more comprehend what an employee is than one could ascertain the legal essence of the term designee, if defined merely as an "individual designated by a designator."

To comprehend the meaning of employee (or designee), one must first understand what it means to employ (or to designate). The root "employ," of course, may mean many different things, even within the business/labor context; though it is often used to describe the current contractual relationship between a company and a designated worker, that is not its exclusive meaning.[9] Where the use of a term in a particular context admits of more than one meaning, that term is, *ipso facto*, ambiguous.

III.

Because the term "employees," as used in Section 704(a) is ambiguous, it is our duty to construe its meaning. I choose to interpret the term consistently with what I perceive to be the clear intent of Congress to effectively remedy the problem of discrimination in employment--a problem that today's decision will not assist in solving.

Chief Judge Ervin and Judge Michael join in this dissent.

---

[9] For example, a manufacturing concern may have been, or will be, a major "employer." without regard to any particular worker. Similarly, a recent retiree of Company X receiving a gold watch for his or her faithful service may be introduced at the year-end awards banquet as a long-time "employee" of the company.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

While the majority has some basis for adopting the reasoning that the term "employee" as used in the statute does not in any case extend to a one-time, former or ex-employee, it is insufficient. In his dissent, Judge Hall convincingly points out the more compelling reasons for reaching the opposite conclusion, regardless of whether the term "employee" in one sense, and in certain circumstances not present here, has a plain meaning or is truly ambiguous. After all, despite the long lapse of time, Joe DiMaggio can still be referred to as a center fielder for the New York Yankees.

Chief Judge Ervin joins in this dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES T. ROBINSON, SR.,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

NO. 93-1562

Appeal from the United States
District Court for the District of
Maryland, at Baltimore.

J. Frederick Motz, Chief District Judge.
(CA-93-28-JFM)

Argued: September 28, 1994

Decided: January 18, 1995

Entered: January 18, 1995

Before HALL, HAMILTON, and MICHAEL,
Circuit Judges.

Reversed and remanded by published opinion. Judge Hall wrote the majority opinion, in which Judge Michael joined.

Judge Hamilton wrote a dissenting opinion.

COUNSEL

ARGUED: Allen M. Lenchek, Washington, D.C., for Appellant. John Foster Shure, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Lawrence Chris Butler, Houston, Texas, for Appellee. ON BRIEF: James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

OPINION

HALL, Circuit Judge:

Charles T. Robinson, Sr., was fired in 1991 by Shell Oil Co., his employer of more than eleven years. Shortly thereafter, Robinson filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell had terminated him on account of his race.

While that charge was pending, Robinson applied for a job with another company. The company contacted Shell, seeking a reference. According to Robinson, Shell retaliated against him for having complained to the EEOC by providing the company with false information and a poor reference.

Robinson then filed a second charge with the EEOC, in which he maintained that Shell's alleged retaliation had violated Section 704(a) of Title VII of the Civil Rights Act of 1964, which provides that

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his *employees* or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a) (1988) (emphasis supplied). The above language, known colloquially as Title VlI's "anti-retaliation" provision, protects "employees" - defined tautologically as "individual[s] employed by an employer." 42 U.S.C. §2000e(f). The EEOC issued Robinson a right-to-sue letter on this second charge, and Robinson timely filed this action on January 4, 1993. Shell moved, under Fed. R. Civ. P. 12(b)(6), to dismiss Robinson's claim on the ground that, as the alleged retaliation occurred after Robinson had been fired by Shell,

Robinson was not Shell's "employee," and therefore not entitled to relief under §704(a). On April 8, 1993, the district court, citing this court's opinion in *Polsby v.* Chase, 970 F.2d 1360 (4th Cir. 1992), granted Shell's motion and dismissed the case.[1]

Scant days later, on April 26, 1993, the Supreme Court, at the urging of both parties, vacated our decision in *Polsby*.[2]

---

[1] *Polsby* involved Title VII and RICO claims brought by a female physician against her former employer, the U.S. Department of Health and Human Services (HHS). In addition to her underlying claims of gender discrimination, Dr. Polsby alleged that HHS employees had retaliated against her after her employment had ended by reneging on a promise to credit her with a year's residency in recognition of the training that she had received.

The district court granted summary judgment to the defendants, finding that all of Dr. Polsby's claims--including the retaliation claim--were time-barred. A panel of this court agreed that the claims were stale, and affirmed the lower court's decision on that basis. However, we held alternatively that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment has ended. *Id.* at 1365.

[2] *Polsby v. Shalala*. 113 S. Ct. 1940 (1993). A new administration had replaced the old during the pendency of the appeal. The Solicitor General's brief adopted Dr. Polsby's position, arguing that the panel had based its alternative holding on a point not briefed and argued, and that summary judgment was otherwise precluded by the existence of a genuine issue of material fact as to the time-bar question. The Court remanded for further consideration "in light of the pos.tion asserted

Robinson filed his notice of appeal in the instant case on May 6, 1993. We now ask anew whether the protection against retaliation afforded by Title VII to "employees" extends to former employees. We conclude that it does; hence, we reverse the judgment of the district court and remand this case for further proceedings.

I.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted).[3] The "statute" in this case is Title VII, and one need not closely scrutinize its language in order to clearly discern Congress's purpose in enacting it. Title VII is sweeping, remedial legislation; it applies to virtually all entities that may directly affect the employment relationship, and it proscribes a vast range of ignoble behavior.[4] There is a detailed enforcement procedure--including, if necessary, resort to the federal courts, which are accorded broad power to grant legal and equitable relief.[5]

---

by the Acting Solicitor General...." *Id.* We in turn remanded to the district court to resolve any outstanding material facts and render a new judgment; that judgment is apparently still pending.

As the appeal in the instant case has progressed, the government's position has remained consistent. We permitted the EEOC to participate in this case *as amicus curiae*, and it has filed a brief and presented oral argument in support of Robinson.

[3] *See also NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 787 (4th Cir. 1971):

> The cardinal rule of statutory construction is that the intent of the legislative assembly is to be given effect . . . and where a literal interpretation of a statutory provision would not accord with the intended purpose of the legislation, or produces an absurd result courts must look beyond the plain words of the statute.

(citations omitted); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600, 606 (4th Cir. 1959) (eschewing a literal reading of the Federal Trade Commission Act where such an interpretation was "plainly at variance with the policy of the legislation as a whole" quoting *Cravens v. United States*, 260 U.S. 178 (1922)], and would produce an absurd result).

[4] Various provisions of Sections 703 and 704 apply to employers, employment agencies, Labor organizations, and joint labor-management committees. Section 703 prohibits, with few exceptions, all forms of discrimination in all aspects of the employment relationship on the basis of an individual's race, color, religion, gender, or national origin. 42 U.S.C. § 2000e-2. Section 704, in addition to the anti-retaliation provision at issue in this case, prohibits the publication in most cases of job notices or advertisements indicating a preference based on a protected classification.

[5] Section 706(g) empowers the court to order declaratory relief, injunctive relief such as

It is evident that Congress has demonstrated, by virtue of Title VII's reach, that it is serious about eradicating the invidious effects of discrimination within the employment relationship. That is why the statute was created, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution. Were we to literally construe the word "employee" in Section 704(a) to exclude former employees, such a construction would actively hinder the enforcement mechanism.

There is, of course, the obvious hindrance of allowing an employer to escape sanctions for behavior that, but for the fortuity of the employment status of the behavior's intended target, is clearly unlawful. More subtle, however,

---

reinstatement or hiring of employees with or without back pay, or "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). In addition, Section 102 of the Civil Rights Act of 1991 now permits courts, in an appropriate case, to award compensatory and punitive damages for violations of Sections 703 and 704 of Title VII. 42 U.S.C.A. § 1981a (1994). This most recent expansion of the courts' remedial powers addresses a major concern in *Polsby*--that appropriate relief would be difficult or impossible to fashion for former employees who, typically, obtain another job despite the best (or worst) efforts of a previous employer.

is the hindrance on enforcement that will almost certainly result from the remaining employees' reluctance to bring other violations to the EEOC's attention if there is a chance that his or her term of employment will soon end (thus giving the employer carte blanche to retaliate). Conversely, an aggrieved person should not be forced to remain with an abusive employer solely to avail himself of the full protection of Title VII.

Eroding Title VII's effective enforcement concomitantly erodes the vitality of its substantive provisions. Because we believe it apparent that Congress intended to strengthen--not weaken--Title VII by including Section 704(a), we interpret that section's language to be consistent with the intent that we perceive.[6]

---

[6] Though not essential to our analysis, we note that not only would a literal construction of "employee" in such cases be plainly at variance with the policy of Title VII as a whole, but that such a construction is quite capable of producing absurd results. Imagine a scenario where two disaffected workers at Company X have filed discrimination charges with the EEOC against the company and have each applied to Company Y for another job. Suppose that on a Friday afternoon, Company X's personnel department receives a letter from Company Y asking for references on both workers. Suppose further that Worker A's letter of resignation becomes effective on the same Friday, while Worker B stays for another week. If Company X waits until Monday to respond to Company Y's request and then provides false information on both workers in retaliation for

II.

Our decision today comports with those of the vast majority of circuits that have addressed this issue,[7] and is

---

each having filed discrimination charges, then, under a literal interpretation of the word "employee" in Section 704(a), only Worker B would have a claim for retaliation.

Because there can be no principled distinction between the two workers' situations, we do not believe that Congress could have intended the two cases to be resolved differently. Certainly there is nothing in Section 704(a)'s legislative history that would suggest that Congress expressly considered--and then rejected--the possibility that it would apply to a situation like Robinson's; in fact, the legislative history is silent as to the specific matter before us.

We must note, however, that we do not decide this case based primarily on the absence of adverse legislative history, but that we discern Congress's intent by relying in large part on the provisions of the statutory scheme as a whole, of which Section 704(a) was and is an integral part. We do not think that the word "employee" as used in that section is so clearly unambiguous as to preclude resort to this method of statutory interpretation. We imagine that the term is frequently used to actually describe a former employee. e.g., Company X, at its year-end banquet, awarding a gold watch to a recent retiree, "a 25-year *employee* of Company X."

[7] *Charlton v. Paramus Bd. of Educ.*, *25* F.3d. 194, 198-200 (3d Cir. *1994*); *cert. denied*, 63 U.S.L.W. 3421 (U.S. Nov. 28, *1994*); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. *1988*); *O'Brien v. Sky Chefs*, Inc., 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other*

in implicit agreement with another circuit that has construed the nearly identical anti-retaliation provision of the Age Discrimination in Employment Act to apply to former employees.[8] The Seventh Circuit stands alone in reaching the opposite conclusion. *Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991) (affirming a directed verdict for the defendants on the plaintiff's retaliation claim because the complained-of activities took place after the plaintiff had been terminated).

The primary focus in determining whether a plaintiff states a claim under Section 704(a) should be on whether the alleged retaliation either arose from the employment relationship or was related to the employment.[9] Consequently, we believe

---

grounds by Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, *565* F.2d 1262, 1165 (10th Cir. 1977). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (former employee may state a claim under Section 704(a) on something akin to an agency theory where offer of reinstatement is withdrawn in retaliation for the actions of another employee--the plaintiff's husband--in protesting his wife's discharge).

[8] *Passer v. American Chem. Soc'y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991).

[9] *See Charlton*, 25 F.3d at 200 ("an employee may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act is in reprisal for a protected

that the *Reed* court focused its inquiry too narrowly, considering only the contractual aspect of the larger relationship.

In the instant case, we may conclusively state that Shell's alleged retaliation against Robinson--said to involve the dissemination of false information and an undeservedly poor reference--arose from their employment relationship because Shell would not have been provided the opportunity to retaliate against Robinson but for the fact that it had employed him. Though our inquiry need not proceed further, Shell's alleged retaliation was also related to the employment because the retaliation itself assumed the form of facts and opinions grounded in Robinson's professional affiliation with Shell.

We do not share the concerns expressed at oral argument that future generations of management, themselves guilty of no Title VII violation, will be forced to defend -- and possibly be held liable for -- retaliation claims against their company brought by former employees who only discover the wrongdoing years after it has occurred. The "discovery

---

act . . . and *arises out of or is related to the employment relationship."); Pantchenko,* 581 F.2d at 1055 ("the statute prohibits discrimination *related to or arising out of an employment relationship,* whether or not the person discriminated against is an employee at the time of the discriminatory conduct.") (emphases added).

rule," often used to toll statutes of limitations that would otherwise insulate a defendant from liability, is an equitable doctrine; deciding whether to employ it in a particular case requires careful consideration of the prejudice to the defendant as well as the potential injustice to the plaintiff. Our confidence in our brethren to properly consider the merits in such cases is not so low that we feel compelled to foreclose all possibility of review. In any event, Robinson's claim in *this* case is not stale, therefore we decline to march in step with this particular parade of horribles.

The judgment of the district court is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED

HAMILTON, Circuit Judge, dissenting:

Employer retaliation is deplorable and regrettable and has no place in our society. But, that is not to say that every act of employer retaliation is remediable under Title VII. When interpreting a statute such as the one before this court, my role as an Article III jurist is not to decide what the law should be, but rather to apply the rules of statutory construction in order to give meaning to the statute Congress created. In holding that §704(a) of Title

VII provides a remedy to former employees for acts of retaliation committed by an employer *after* the employment relationship has terminated? The majority disregards the rules of statutory construction which this court is bound to follow. Specifically, the majority; (1) disregards the plain meaning of the term "employee" and (2) gives the term "employee" a meaning excluded by its definition in 42 U.S.C.A. § 2000e(f) (West Supp. 1994). Furthermore, the majority's holding creates a new cause of action that will unfairly burden employers by requiring them to defend claims of retaliation by former employees several decades in the future when material evidence in their defense has likely vanished. I, therefore, respectfully dissent.

I.

Initially, it is helpful to lay out the all too familiar framework of statutory interpretation. Courts are charged with the duty to apply the law that Congress enacted. Accordingly, "[w]e begin, as we must, by examining the statutory language, bearing in mind that we should give effect to the legislative will as expressed in the language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In examining statutory language,

generally, words are given their common usage, and "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* We must acknowledge that the duty of this court is to adhere faithfully to the rules of statutory interpretation rather than to "exercise[] a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship." *Crooks v. Harrelson, 282 U.S. 55, 60* (1930). If a statute defines a term in its definitional section, then that definition controls the meaning of that term wherever that term appears throughout the statute. *See Florida Dep't of Banking & Finance v. Board of Governors of Fed Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) (definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), *cert. denied*, 481 U.S. 1013 (1987). As a general rule "[a] definition which declares what a term means . . . excludes *any* meaning that is not stated." 2A George Sutherland, *Statutes and Statutory Construction* §47.07, at 152 (5th ed. 1992) (emphasis added).

Our inquiry must cease if the statutory language is unambiguous and "'the statutory scheme is coherent and

consistent'" *Murphy*, *35* F.3d at 145 (quoting *United States v. Ron Pair Enters., Inc., 489 U.S.* 235, 240 41 (1989)). In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Id.* (quoting *Caminetti v. United States, 242* U.S. 470, 485(1917)). "The language being facially clear and 'within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *Caminetti, 242 U.S.* at 485). Thus, if the language of the statute is not ambiguous, then we do not engage in interpretation of the language; rather, we merely apply the language. *See id.*

There are, however, rare and narrow exceptions to these precepts *as Murphy* noted: "[w]hile cautioning lower federal courts not to stray beyond the plain language of unambiguous statutes, the Supreme Court has also explained that departure from the statutory language may be permitted in limited circumstances." *Id.* One such circumstance arises if the literal application of statutory language would lead to an absurd result. *See Crooks, 282 U.S.* at 59-60. Only, however, "under rare and exceptional circumstances" do courts find that literal application of statutory language

would lead to an absurd result. *Id.* at 60. In such cases, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.*

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See Ron Pair Enters., Inc.*, 489 U.S. at 242 (The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks omitted). To come within the ambit of this exception to literal application of the statutory language, however, the intent must have been clearly expressed by the legislative body. *See Russello v. United States, 464* U.S. 16, 20 (1983). Most importantly, in the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, 935* F.2d 501, 506 (2d

Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokely*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

Otherwise, if the plain language of the statute is ambiguous a court may look beyond the plain language to the legislative history for guidance. *See United States v. Southern Management, 955* F.2d 914, 920 (4th Cir. 1992) (If the statute's words did not convey a clear meaning, court should look to "other source[s] of legislative intent."). Thus, with the groundwork laid, I turn to the statute at issue.

Section 704(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment* . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. § 2000e-3(a) (West 1981) (emphasis added). Subsection 2000e(f) defines "employee" for purposes of all provisions of Title VII as "an individual employed by an employer." 42 U.S.C.A. § 2000e(f) (West Supp. 1994). Read in *pari materia*, these sections of Title VII provide a remedy to *employees* and *applicants for employment* who have either availed themselves of Title VII protections or assisted others in doing so for acts of retaliation committed by their employers during the employment relationship.

Despite the fact that §2000e(f) defines the term "employee" as "an individual employed by an employer," the majority legally concludes, rather remarkably, that the term "employees" as used in §704(a) means "former employees." Application of the canons of statutory construction leads to the inescapable conclusion that the meaning of the term "employees" is plain and that construing the term to include "former employees" is legally untenable. Because "former employees" are not included in the statutory language, §704(a) of Title VII does not protect them. Given that the statute does not protect former employees, Robinson has no claim under its aegis.

Because Title VII defines "employee" for purposes of all provisions of Title VII, that definition controls the meaning of "employee" wherever it appears

throughout the statute. *See Florida Dep't of Banking & Finance, 800* F.2d at 1536. Title VII defines employee as "an individual employed by an employer," 42 U.S.C.A. §2000e(f) (West Supp. 1994). Because Title VII *does not* define "employee" as an individual *no longer employed by* an employer? then that meaning is excluded as a meaning from the term "employee." *See Statutes and Statutory Construction* §47.07, at 152. We are simply prohibited from reading into the clear language of the definition of "employee" that which Congress did not include. *See Murphy,* 35 F.3d at 145. For if Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including "former employee" when defining the term "employee."

Next, the language comprising Title VII's *definition* of the term "employee" is *not ambiguous* "an individual employed by an employer," 42 U.S.C.A. § 2000e(f) (West Supp. 1994). The rules of statutory construction require us to give the words Congress used to define "employee" their common usage. *See Murphy,* 35 F.3d at 145. The term "employed" as used in §2000e(f) is commonly used to mean "performing work under an employer-employee relationship." *Black's Law* Dictionary 525 (6th ed. 1990). Certainly, the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship," as evidenced by

the majority's failure to cite even one dictionary definition or case in support of this truly remarkable proposition. Furthermore, "employer" as used in §2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term employer is commonly used to mean "one who no longer employs the services of others." Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed. *See Murphy, 35* F.3d at 145. this court is bound to apply literally the term "employees" in §704(a) as defined by Congress in 42 U.S.C.A. §2000e(f) without examination of any other sources of legislative intent. *Id.*

The court in *Polsby v. Chase, 970 F.2d* 1360, 1365-67 (4th Cir. *1992), vacated,* 113 S. Ct. 1940 (1993),[1] also

[1] The Supreme Court vacated this court's judgment in *Polsby* and remanded the case to this court for "further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, *1993.*" *Polsby v Shalala,* 113 S. Ct. 1940 (1993). Because the Supreme Court vacated *Polsby* on this ground, I maintain that no meaningful argument can be made that the Supreme Court in any way addressed the merits of the issue here and concluded *Polsby* to be legally incorrect. *See United States Dep't of Health & Human Servs.. v FLRA, 983* F.2d 578, 581-82 & n.2 (4th Cir. 1992) (adopting reasoning of vacated opinion where vacatur did not address the issue). Conversely, I do not contend that *Polsby* carries any precedential weight. *Id.*

relied on a plain reading of §704(a) to hold that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated. In *Polsby*, the court correctly recognized that the plain language of §704(a) is likewise *void* of any language referring to *former* employees; rather, §704(a) specifically indicates that it is unlawful for an employer to retaliate against (1) employees or (2) applicants for employment. *Id.* at 1365. The *Polsby* court concluded that the absence of any language in §704(a) referring to former employees was strong evidence that Congress did not intend Title VII to protect former employees. *Id.* In a similar vein, Congress' decision in enacting §704(a) to add "applicants for employment" as persons *distinct* from "employees" to be protected from retaliation is strong evidence of Congress' intent that the term "employees" in §704(a) does not include former employees. *Id.* Therefore, applying ordinary meanings to the terms employees, employed and employer, it is clear that §704(a) of Title VII does not remedy acts of retaliation once the employment relationship has terminated.

Although the rules of statutory construction do not require me to proceed any further in my analysis, in order to emphasize the propriety of my position

and the impropriety of the majority's position, I shall present additional grounds upon which this court relied in *Polsby*, and the Seventh Circuit relied *in Reed v. Shepard, 939* F.2d 484, 492-93 (7th Cir. 1991), to hold that §704(a) of Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated.

The *Polsby* court correctly recognized that the types of practices that Title VII forbid strongly point toward §704(a)'s scope not extending beyond the employment relationship. *Polsby, 970* F.2d at 1365. The types of practices that Title VII forbid are particularly related to *employment, not* post-employment matters. *Id.* For example, Title VII specifically defines "unlawful employment practice" in part as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin." 42 U.S.C.A. §2000e-2(a)(1) (West 1981). This definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated. *Polsby*, 970 F.2d at 1365.

Similarly the Seventh Circuit concluded that §704(a) of Title VII does not redress post-employment retaliation because the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an "adverse *employment* action" that necessarily entails conduct that occurs during the employment relationship. *Reed*, 939 F.2d at 492-93 (emphasis added). The *prima facie* case for retaliation under Title VII as set forth by our circuit also requires an employee to prove that his employer took "adverse *employment* action against" him. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (emphasis added). Adverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge. Consequently, any adverse action taken after the employment relationship has terminated cannot be actionable under Title VII. Recognizing this point, the *Reed* court stated that because "the alleged retaliatory activities took place *after* the termination of Reed's employment" those activities were "not an adverse employment action." *Reed, 939* F.2d at 492-93.

Given the types of practices that Title VII forbid, it follows that Congress drew the line defining the scope of Title VII at its most logical place--

the termination of the employment relationship. As the *Polsby* court succinctly stated, "Title VII does not redress discriminatory practices, however unsavory, which occur after the employment relationship has ended." *Polsby, 970* F.2d at 1365. Rather, Congress specifically enacted § 704(a) of Title VII so that employees falling victim to discrimination during their employment would be able to invoke Title VII to protect their rights without fear of retaliation. My interpretation of § 704(a) fully comports with this purpose and thus is in accord with the express intent of Congress.

II.

Incredibly, the majority totally disregards the aforementioned canons of statutory construction. The majority, as well as those circuits with which it is in accord,[2] primarily rely on broad, and

---

[2] *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir. *1994), cert. denied, 63 U.S.L.W.* 3421 (U.S. Nov. 28, 1994); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322,1331 (5th Cir. 1991); *Bailey v. USX Corp.*, 850 F.2d 1506,1509 (11th Cir. 1988); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864,869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477,1481-82 (9th Cir. 1987) *(en banc); Pantchenko v. C.B. Dolge Co., Inc.*, 581 P.2d 1052,1055 (2d Cir. *1978); Rutherford v. American Bank of Commerce*, 565 F.2d 1162,1165 (10th Cir. 1977).

as the *Polsby* court noted, "dubious" considerations of policy to disregard the plain language of §704(a) in order to protect former employees. Essentially, both maintain that a literal interpretation of the term "employees" produces a result that would defeat the underlying policies of Title VII to eradicate discrimination in employment. *See, e.g., Charlton,* 25 F.3d at 200; *Bailey,* 850 F.2d at 1509. Specifically, the majority concludes that a literal construction of the term "employees" in §704(a) "would actively hinder the enforcement mechanism" of Title VII. *Ante* at 5.

No meaningful argument can be made that any language in Title VII's definition of the term "employee" is ambiguous thus allowing this court to look beyond the plain meaning for guidance. As proved, "employees" in §704 cannot be read to include former employees, because if a statute defines a term, then all other meanings of that term not stated are excluded. *See Statutes and Statutory Construction* §47.07, at 152. The majority erroneously disregards Title VII's definition of "employee" as the definitive source to determine the meaning of the term "employees" as used in §704(a), summarily dismissing it as "tautological." *See id; Florida Dep't of Banking & Finance, 800* F.2d at 1536 (stating that the definition of term in definitional section of

statute controls construction wherever that term appears throughout the statute). Noteworthy is the fact that the majority does not offer any authority for such an obvious deviation from the well-settled rules of statutory analysis. In sum, interpreting "employees" to include former employees requires this court to give "employees" a definition beyond its plain meaning and disregards the definition provided by Congress. *See Ron Pair Enterprises, Inc., 489 U.S.* at 241-42.

Finally, and most importantly, a literal application of the term "employees" in §704(a) as defined by Congress in §2000e(f) would not produce an absurd result, or as the majority concludes, "actively hinder the enforcement mechanism," *ante* at 5, thus allowing us to disregard the statute's plain meaning. The reason is that Congress *did not clearly express* any intention that Title VII redresses employer conduct beyond the employment relationship. The majority's conclusion that a literal application of the statute's language would produce an absurd result or actively hinder the enforcement mechanism of Title VII necessarily assumes that Congress made known its intentions for a result different than that produced by a literal application of the statute's language. The majority divines what it posits as Congress' intent that §704(a) protects

former employees from the "reach" of Title VII:

> It is evident that Congress has demonstrated, by virtue of Title VII's reach, that it is serious about eradicating the invidious effects of discrimination within the employment relationship. That is why the statute was created, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices would come forward without fear of retribution. Were we to literally construe the word "employee" in §704(a) to exclude former employees, such a construction would actively hinder the enforcement mechanism.

Ante at 5.

As authority permitting it to conclude Congress intended §704(a) to protect former employees, based solely on the proposition that the broad "reach" of Title VII conveys Congress' intent to do so, the majority relies on authority that supports my position. This authority *is*

Crandon v. United States, 494 U.S. 152, 158 (1990). The majority quotes *Crandon* as follows: "In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Id.* The majority quotes *Crandon* out of context. *Crandon* involved the interpretation of 18 U.S.C.A. §209(a) (West Supp. 1994) to determine whether employment status is an element of the offenses of receipt by a government employee of supplemental salary from an outside source and payment of supplemental salary by an outside source to a government employee. *See Crandon, 494 U.S.* at 152. In holding that employment status is an element of both offenses, the Court reasoned:

> We note only that a literal reading of the statute--which places a pre-Government service severance payment outside of the coverage of §209(a) is consistent with one of the policies that motivated the enactment of the statute. Because the language Congress used in § 209(a) is thus in "harmony with what is thought to be the spirit and purpose of the act," this case presents none of the "rare and exceptional circumstances" that

may justify a departure from statutory language.

Id. at 168 (quoting *Crooks*, 282 U.S. at 59). In regard to the rare and exceptional circumstances justifying a departure from the statutory language, *Crooks* stated: "the absurdity must be so gross as to shock the general moral or common sense. *And there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." Crooks, 282 U.S.* at 60 (emphasis added). Therefore, contrary to the majority's characterization, *Crandon* followed the well settled rule of statutory construction requiring courts to apply literally the plain language of a statute, barring the rare and exceptional case where Congress clearly expresses its desire for a different result than that produced by the literal application of the plain language.

In this case, nowhere does Congress make plain that this court should not follow the letter of the law. As the majority acknowledges, the legislative history of Title VII is noticeably silent with regard to whether Title VII protects former employees. *Ante* at 6 n.6. Moreover, the majority has not pointed to any specific provisions of Title VII remedying post-employment-employer-conduct in support of its argument that the design of Title VII as a whole makes clear Congress' intent that §704(a) of

Title VII protects *former* employees. *Ante* at 5.

Given the lack of affirmative Congressional expression on whether Congress intended §704(a) to protect former employees, a meaningful argument cannot be made that a literal application of the term "employees" as used in §704(a) and defined in §2000e(f) creates the rare and exceptional circumstance of producing an absurd result or actively hindering the enforcement mechanism. Accordingly, the majority's position is completely untenable.

III.

Finally, the majority's interpretation will produce absurd results. For example, suppose Employee X, a minority, files a race discrimination charge against his employer, Company A. In retaliation, Employee X's supervisor falsely adds negative performance comments to Employee X's personnel file. Employee X leaves Company A and accepts a job with Company B; thirty years pass. Employee X leaves Company B and seeks a new job with Company C who requests recommendations of X from A and B. Employee X's supervisor at Company A died five years earlier; his replacement researches Employee X's personnel file and writes a negative recommendation according to the information in Employee X's file. Under the majority's holding,

Employee X can bring a suit under §704(a) alleging retaliation against Company A for conduct that occurred thirty years earlier by a person no longer employed, let alone deceased. Unquestionably, by enacting §704(a) of Title VII, Congress could not have intended an employer, thirty years later, to defend claims by former employees alleging retaliation as the result of alleged discriminatory acts that only surface when any evidence in its defense has likely vanished. Such a result would be absurd. Furthermore, my concerns are not allayed by the majority's statement that the statute of limitations or the doctrine of equitable tolling would often bar such a suit, because the cause of action for retaliation arises upon the employer's present negative recommendation to the former employee's proposed employer.

IV.

I realize my view that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated has been embraced by only one court, *see Reed, 939 F.2d* at 494-93, while several other courts have reached a contrary conclusion, *see, e.g., Charlton, 25* F.3d at *198-200; J.M. Huber Corp.*, 927 F.2d at 1331. In my view, the conclusion reached by the majority today and those courts

with which it is in accord is an impulsive one, brought on by the quite laudable desire to eliminate all retaliation in the work place. However, my role as a jurist is not to see to the task of eradicating retaliation in the work place. Under our Constitution, that burden falls to the legislative branch. My only role here is to give meaning to the statute Congress enacted through the well-defined rules of statutory construction. A faithful adherence to those precepts leads to one inescapable and incontrovertible conclusion Title VII does not provide a remedy under the facts of this case. because I would affirm the district court's dismissal of Robinson's complaint pursuant to Fed. R. Civ. P. 12(b)(6), I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES T. ROBINSON, SR.

v.

SHELL OIL COMPANY

Civil No. JFM-93-28

ENTERED April 8, 1993

MEMORANDUM

Charles T. Robinson, Sr., has filed this action under Title VII of the Civil Rights Act of 1964, alleging that Shell Oil Company, his former employer, "has been providing false information and negative job references to perspective [sic] employers." Defendant has filed a motion to dismiss to which plaintiff has responded.

Defendant's motion will be granted. The Fourth Circuit has expressly held that Title VII does not confer upon an ex-employee a cause of action against a former employer for acts of retaliation allegedly committed after the employment relationship has ended. See Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992). Although, as plaintiff points out, other Circuits have held to the contrary,

this court is, of course, bound by the law of the Fourth Circuit.

A separate order effecting the ruling made in this memorandum is being entered herewith.

Date: April 8, 1993

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1562

CA-93-28-JFM

CHARLES T. ROBINSON, SR.

Plaintiff - Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

v.

SHELL OIL COMPANY

Defendant - Appellee

FILED March 1, 1995
ENTERED March 1, 1995

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the June 1995 session of Court. Within ten days of the date of this order, twenty (20) additional copies of appellant's brief, twenty (20) additional copies of appellee's brief and twenty (20) additional copies of the appellant's reply brief, if any, shall be filed

The appellee will file twenty (20) additional copies of the joint appendix.

For the Court,

/s/ Bert M Montague
CLERK